Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
SBC Communications Inc.	)	
	)	WC Docket No. 04-172
Emergency Petition for Declaratory Ruling, Preemption, and for Standstill Order To Preserve the Viability of Commercial Negotiations	)	

COMMENTS OF THE VERIZON TELEPHONE COMPANIES[1]

Verizon files these comments to confirm what the Commission itself has already held: that the requirements of 47 U.S.C. § 252 are inapplicable to commercial agreements that do not pertain to the substantive duties set out in section 251(b) and (c).

In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the D.C. Circuit vacated the Commission's decision to unbundle certain network elements, including the mass-market switching element and high-capacity loops and transport. As a result, once the mandate for that decision issues, those network elements will no longer be subject to mandatory unbundling pursuant to section 251(c). At the same time, however, as the Commission has recognized, those facilities will remain available to any competitor that seeks to rely on them, provided that the competitor and incumbent LEC can reach mutually agreeable terms for such access. Indeed, in response to the Commission's unanimous call for business-to-business negotiations, many carriers, Verizon among them, are engaged in productive discussions with the aim of reaching commercially reasonable wholesale arrangements to replace elements that, under *USTA II*, need not be unbundled pursuant to section 251(c).

[1] The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. and are listed in Attachment A.

Those discussions – and any agreements that flow from them – are outside the scope of section 252. As this Commission squarely held in the *Qwest Declaratory Ruling*,[2] the 1996 Act specifically and expressly ties the requirements set out in section 252 to the substantive requirements set out in section 251(b) and (c). Where the parties negotiate terms for access to a facility that need *not* be unbundled under section 251(c), it follows that the requirements in section 252 do not apply. Indeed, any other result would conflict not only with Commission precedent and the text of the 1996 Act, but also with sound policy. The requirements of section 252 give ultimate control over many issues to state commissions, not to the parties to the negotiations, and, at least as interpreted previously, give carriers the ability to pluck isolated terms out of negotiated agreements without accepting the give-and-take between various provisions that is necessary to reach a balanced agreement. Extending those requirements to circumstances in which parties seek to negotiate agreement terms that are not related to section 251 would thus make parties reluctant to negotiate in the first place, or at a minimum would severely constrain the give-and-take that is vital to successful commercial negotiations.

I. *USTA II* Removes Certain Network Elements from the Scope of Mandatory Unbundling Under Section 251(c)

In the *Triennial Review Order*,[3] this Commission concluded that mass-market switching and high-capacity loops and transport must be unbundled on a nationwide basis. It did so on the basis of provisional nationwide impairment determinations for each of these network elements,

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[2] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

coupled with delegations to state commissions to make the ultimate determination as to whether those elements should be unbundled. In *USTA II*, the D.C. Circuit vacated both the impairment determinations and the delegation. The decision to delegate unbundling determinations to the states, the court concluded, was inconsistent with the text of the 1996 Act and basic principles of administrative law.[4] And the provisional impairment determinations were unsupported in the record and in any event could not survive without the (unlawfully delegated) authority of the state commissions to narrow them.[5]

The upshot of the *USTA II* decision is that, once the mandate issues, mass-market switching and high-capacity loops and transport need not be unbundled pursuant to section 251(c)(3). As both the Commission and the D.C. Circuit have stressed, a valid impairment finding is a statutory prerequisite to section 251(c)(3) unbundling.[6] Without a lawful prior federal impairment finding, the "duty to provide . . . network elements on an unbundled basis" set forth in section 251(c)(3) simply does not extend to mass-market switching and high-capacity loops and transport.

This is not to say, however, that other carriers will not have access to the ILECs' network facilities where they wish to use them as part of their local entry strategy. In the absence of a federal rule, parties remain free to negotiate business-to-business arrangements for access to

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[4] *See* 359 F.3d at 565-68, 573-74.

[5] *See id.* at 568-71, 574-77.

[6] *See* Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9596, ¶ 16 (2000) (Commission must determine "impairment" "before imposing additional unbundling obligations on incumbent LECs" rather than "impos[ing] such obligations first and conduct[ing] [its] 'impair' inquiry afterwards"), *petitions for review denied*, *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*"); *CompTel*, 309 F.3d at 14; *cf. USTA II*, 359 F.3d at 589 ("we see nothing unreasonable in the Commission's decision to confine" the pricing standard that applies to UNEs "to instances where it has found impairment").

ILEC facilities that meet their respective needs. Indeed, the Commissioners themselves unanimously endorsed such negotiations in the wake of the *USTA II* decision, emphasizing the benefits that commercial arrangements would bring to the industry and the consumers it serves.[7] And Verizon, for its part, has embraced that approach. In fact, as Verizon noted in response to the Commissioners' call for negotiations, it has "been trying to engage [its competitors in good-faith discussions for some time and will continue to do so."[8]

Verizon is optimistic that its negotiations with CLECs will be productive – in fact, Verizon has already announced a letter of intent with one CLEC,[9] and it expects that more will follow. As discussed below, however, that success hinges in part on the Commission's conclusion – already set forth in Commission precedent and mandated by the plain text of the 1996 Act and sound policy – that section 252 is inapplicable to these negotiations.

II. Commercial Agreements That Do Not Relate to Unbundling Obligations Under Section 251(c) Are Not Subject to the Requirements of Section 252

The requirements set out in section 252 go hand-in-hand with the substantive obligations set out in section 251. The converse, of course, is also true: the requirements set out in section 252 do *not* apply to negotiations and agreements that do not relate to the substantive obligations

[7] *See*, *e.g.*, Letter from Chairman Michael K. Powell, *et al.* to Ivan Seidenberg, Chairman and CEO, Verizon (Mar. 31, 2004).

[8] Letter from Ivan Seidenberg, Chairman and CEO, Verizon, to Chairman Michael K. Powell, *et al.* (Apr. 5, 2004).

[9] *See* Margaret Boles, *Verizon Reaches Tentative Pact with CLEC for Network Access*, TR Daily (Apr. 23, 2004). Verizon has also announced "Wholesale Advantage," a commercial offering available to all CLECs that would give competitors access not only to wholesale voice service – at rates that would transition from today's artificially depressed UNE-P rates to commercial rates over the course of three years – but also to other wholesale services, such as DSL, voicemail, and inside wire maintenance. *See* Brian Hammond, *Verizon Proposes Wholesale Framework, Would Offer CLECs DSL, Other Services*, TR Daily (Apr. 21, 2004); Susan Polyakova, *Verizon Announces Framework for Commercial Agreements with CLECs*, Comm. Daily (Apr. 22, 2004).

in section 251. Thus, if and when Verizon reaches agreement with a CLEC over the terms of wholesale offerings to replace elements or combinations of elements that no longer need to be unbundled pursuant to section 251(c), that agreement would not be subject to state commission review and approval under section 252(e), nor would it be subject to the pick-and-choose rules set forth in section 252(i) and Commission rules.[10] Likewise, if Verizon and a CLEC find themselves unable to reach agreement over such terms, neither party would be entitled to invoke a state commission's authority to arbitrate "open issues" pursuant to section 252(b).

The Commission itself has already reached this result, in the *Qwest Declaratory Ruling*. There, the Commission addressed Qwest's argument that section 252 did not apply to agreements pertaining to "network elements that have been removed from the national list of elements subject to mandatory unbundling."[11] The Commission endorsed that understanding, specifically rejecting the argument that *all* access agreements between ILECs and CLECs are subject to section 252.[12] Section 252, the Commission explained, applies to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)."[13] As a result, "an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation" – *i.e.*, pertaining to the specific statutory obligations set forth in section 251(b) and (c) – "is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[14] By the same token, an agreement that does *not* create an ongoing obligation

[10] *See* 47 C.F.R. § 51.809.

[11] 17 FCC Rcd at 19338-39, ¶ 3.

[12] *See id.* at 19341, ¶ 8 n.26.

[13] *Id.*

[14] *Id.* at 19341, ¶ 8.

pertaining to those duties – for example, an agreement for wholesale services that replace a network element or a combination of elements that is *not* required to be unbundled under section 251(c)(3) – is *not* subject to section 252. Any other result, the Commission stressed, would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[15]

That dispositive holding is compelled, moreover, by the text and structure of the 1996 Act. The statutory provision that determines the applicability of section 252 requirements is section 252(a)(1). That provision is triggered by "a request for interconnection, services, or network elements *pursuant to section 251*."[16] Upon receiving such a request, an ILEC "may negotiate and enter into a binding agreement with the requesting . . . carrier," and the resulting agreement "shall be submitted to the State commission" for review and approval and is then subject to pick-and-choose.[17] Likewise, where the parties are unable to reach agreement in response to such a request, either party may, within a certain time period, "petition a State commission to arbitrate any open issues."[18]

The core question, then, is whether commercial negotiations over wholesale services to replace elements or combinations of elements that need *not* be unbundled under section 251(c)(3) are nevertheless negotiations in response to a request made "pursuant to section 251." They plainly are not. On the contrary, such negotiations are undertaken pursuant to the parties' joint interest in establishing a workable, commercial arrangement *outside the scope of section 251*. Indeed, it would rob section 252(a)(1)'s "pursuant to" clause of all meaning to suggest that

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[15] *Id.*

[16] 47 U.S.C. § 252(a)(1) (emphasis added).

[17] *Id.*

[18] *Id.* § 252(b)(1).

any negotiations regarding access to ILEC networks on a wholesale basis automatically trigger section 252, regardless of whether those negotiations are intended to delineate the precise terms of access to elements or services that must be provided under section 251(b) or (c).

Section 251(c)(1) confirms that analysis. That provision mandates that ILECs negotiate and, if necessary, arbitrate – pursuant to the processes set out in section 252 – "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection."[19] An ILEC's willingness to provide wholesale arrangements that need not be made available pursuant to section 251(b) or (c) plainly has nothing to do with its "fulfill[ment] [of] the duties described" in section 251(b) or (c). It follows that an agreement that results from that willingness to negotiate such wholesale arrangements voluntarily is likewise outside the scope of section 252.

This result is also supported by the *Triennial Review Order*'s determination that the substantive rules that apply to elements unbundled under section 251(c)(3) – including both the pricing rules and the combinations rules – do not apply to wholesale arrangements that are not required under section 251(c).[20] Those rules apply, the Commission stressed, only with respect to "network elements unbundled pursuant to section 251 *where impairment is found to exist*."[21] "Where there is no impairment under section 251 and a network element is no longer subject to unbundling," those standards therefore do not apply.[22]

That determination, which the D.C. Circuit expressly upheld in *USTA II*, applies equally here. Just as the substantive standards the Commission has applied to section 251(c)(3)

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[19] *Id.* § 251(c)(1).

[20] *See* 18 FCC Rcd at 17386, ¶ 657.

[21] *Id.* at 17386, ¶ 656 (emphasis in original).

[22] *Id.*

unbundled network elements are out-of-place where impairment does not exist, so too is the section 252 framework that Congress intended to apply only in specifically delineated circumstances. Any other result would "gratuitously []impose" on commercial agreements the same procedural requirements that the 1996 Act specifically applies only to agreements implementing section 251(b) and (c), in conflict with Commission precedent and the intent of Congress.[23]

Finally, the result the Commission reached in the *Qwest Declaratory Ruling* is sound policy. Application of section 252 to negotiations over wholesale arrangements that are not required under section 251(c) would interject regulatory uncertainty into the ongoing process of business-to-business discussions and would frustrate the commercial negotiations the Commission has attempted to jump-start.

Section 252, where it applies, authorizes state commissions to arbitrate open issues that the parties cannot resolve in negotiations. In addition, that provision requires parties to submit negotiated agreements to state commissions for review and approval. Both requirements, however, are wholly unsuited to commercial negotiations. If issues that cannot be resolved in negotiations will be submitted to state commissions for resolution, parties will be less likely to negotiate in the first place, as they recognize that the ultimate decision whether to accept particular terms will be largely out of their hands. Similarly, if state commissions can review and potentially modify voluntary commercial agreements, parties will inevitably attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing the parties' ability to lock one another in at the bargaining table. Interjecting state commissions into negotiations in these ways would thus sharply circumscribe the parties' ability to retain control

[23] *Id.* at 17387, ¶ 659.

over the terms of their agreements, and accordingly promises to chill the very negotiations the Commission has sought to encourage.

In addition, under the Commission's current pick-and-choose rule,[24] even if a state commission does not pick apart a commercial agreement, competitors may attempt to do so. Under that rule, incumbent LECs must "permit third parties to obtain access . . . to any *individual* interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252."[25] As a result, CLECs, rather than being required to opt-in to an agreement (if at all) in its entirety, can pick and choose "any provision in an approved interconnection agreement between another competitor and the incumbent LEC."[26] That means that an agreement that an ILEC finds acceptable only on a multistate basis may conceivably be made available to competitors on a state-by-state basis. Similarly, an arrangement that an ILEC finds acceptable only in connection with other aspects of an agreement may be divorced from those other aspects and made available to all comers on a stand-alone basis. In these circumstances – where CLECs can pick and choose isolated terms without accepting the trade-offs that were necessary to reach a balanced agreement – incumbent LECs will "seldom make significant concessions in return for some trade-off for fear that third parties will obtain the equivalent benefits without making any trade-off at all."[27] In this way, too, section 252 would limit the willingness of parties to reach innovative, mutually acceptable

[24] *See* 47 C.F.R. § 51.809.

[25] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16139, ¶¶ 1314-1315 (1996) (emphasis added) (subsequent history omitted).

[26] *Triennial Review Order*, 18 FCC Rcd at 17410, ¶ 715.

[27] *Id.* at 17413, ¶ 722.

wholesale terms outside of section 251. For the reasons explained above, nothing in the statute or Commission precedent requires, or even permits, that result.

Conclusion

The Commission should confirm that negotiations and any resulting agreements that pertain to wholesale offerings to replace elements or combinations of elements that no longer need to be unbundled pursuant to section 251(c) are not subject to the requirements of section 252.

Respectfully submitted,

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Attachment A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.